SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MADERA

MICHAEL R. KEITZ, an individual, in his Official Capacity as District Attorney for the County of Madera,

Petitioner,

vs.

COUNTY OF MADERA, a Municipal Corporation; and DOES 1 through 20, inclusive,

Respondent.

Case No. MCV062112

FINDINGS AND ORDER AFTER HEARING ON PETITION FOR PERMANENT INJUNCTION

Hearing Date: 3-8-13
Department: 5

The above-entitled action came on for hearing on March 8, 2013, in Department 5 of the above entitled court, Judge James E. Oakley, presiding. The petitioner, Michael R. Keitz (hereinafter "Keitz"), was represented in court by his attorney Martin J. Mayer of Jones & Mayer. The respondent, County of Madera (hereinafter "County"), was represented in court by its attorney Matthew E. Fletcher of McCormick, Barstow, Sheppard, Wayte & Carruth LLP. By stipulation of the parties, the petition for a permanent injunction was submitted entirely upon the record presented for the hearing of the petition for a preliminary injunction. Having considered

the pleadings, the declarations, the exhibits, the points and authorities, and the legal arguments of each party, the Court finds and rules as follows:

I. FACTS

Keitz is the District Attorney of the County of Madera. In 2009, Karen Mitchell, a Deputy District Attorney, filed a grievance regarding potential workplace misconduct involving Keitz. On December 4, 2009, Ms. Mitchell's attorney sent a letter threatening litigation. David A. Prentice was, at that time, the County Counsel for the County of Madera. Upon receiving the letter, Mr. Prentice directed Lonn Boyer, the Human Resources Director for the County of Madera, to retain attorney Daniel W. Rowley to conduct an investigation of the allegations of Ms. Mitchell contained in the letter.

Mr. Rowley is an attorney with the law firm of Gilmore, Wood, Vinnard & Magness, P.C. in Fresno, California. One of the areas of emphasis in Mr. Rowley's law practice is conducting workplace investigations regarding employment issues. During the time that Mr. Prentice was the County Counsel, Mr. Rowley was routinely hired by the County to conduct workplace investigations when Mr. Prentice determined there was a potential threat of future litigation. Mr. Rowley has conducted numerous investigations for the County of Madera involving many different types of employee complaints.

Mr. Rowley was asked to conduct a neutral, independent investigation of a series of complaints of a hostile work environment and discrimination by employees of the District Attorney's Office against Keitz and Supervising District Attorney Kevin Maloney. According to Mr. Prentice, County employees were directed to cooperate with Mr. Rowley's investigation and to keep the matter confidential. Between January and May 2010, Mr. Rowley conducted interviews and drafted his report (hereinafter "the Rowley report").

The report was dated May 28, 2010, and was addressed to Mr. Prentice in his capacity as County Counsel. Mr. Rowley describes that he was not retained to represent the County in a

disputed matter, but was retained, as an attorney, to conduct a neutral investigation and provide a report containing his observations, opinions and conclusions of the facts regarding the complaints by the complaining employees that work in the Office of the District Attorney. It was the understanding of Mr. Rowley that he was retained to conduct such investigation as is required under the Fair Employment and Housing Act in response to an employee complaint of a hostile work environment and discrimination.

In the view of Mr. Rowley, at all times during his involvement and work in conducting interviews of employees of the Office of District Attorney, and in preparing his report, his client was the County. He viewed Keitz as being one of the subjects of the investigation, whom he interviewed just as he interviewed other employees. At no time did Mr. Rowley consider Keitz to be his client. Mr. Rowley recalls that at no time did he give to Keitz legal advice, or share his observations, analysis or opinions regarding his investigation work performed for the County.

According to Mr. Prentice, the County Counsel at that time, the investigation was conducted and the subsequent report was drafted to help him provide accurate legal advice to his client, the County. Mr. Prentice believed his client to be the County for most matters on which he worked as the County Counsel. However, Mr. Prentice also believed that that on certain matters on which he worked in his capacity as County Counsel from time to time his client would also include, alongside the County, specific individuals pursuant to the task charged to him in his capacity as County Counsel. As explained by Mr. Prentice, in responding to the letter from Ms. Mitchell dated December 4, 2009, threatening litigation against both the County and Keitz, in his capacity as District Attorney, Mr. Prentice understood that he had two clients for that matter, namely the County and Keitz. Mr. Prentice believed that, as County Counsel, he had a duty to represent the County as well as appointed and elected County department heads, which included the District Attorney, unless a conflict of interest existed. Mr. Prentice described his purpose in initiating the investigation to be conducted by Mr. Rowley as being to enable him, as

County Counsel, to provide accurate legal advice to his client the County, and his other client Keitz, pursuant to his representation for both clients as legal counsel in anticipation of the threatened litigation. According to Mr. Prentice, he initiated the retention of Mr. Rowley, in his capacity as County Counsel, to determine if there was any basis to the threatened litigation by Ms. Mitchell against the County and Keitz. In the view of Mr. Prentice, Mr. Rowley was retained by him in his capacity as County Counsel to provide him with assistance in the representation of his two clients, the County and Keitz. At the time of the investigation, the interests of Keitz and the County were identical.

Although Mr. Rowley was an attorney, he was not hired to be legal counsel for the County or Keitz. Instead, Mr. Rowley was retained as an investigator to prepare an investigative report into the allegations made by Ms. Mitchell regarding alleged workplace misconduct involving Keitz. At the time that Mr. Prentice initiated the investigation, he assured Keitz and the County that the Rowley report constituted privileged attorney-client work product. Mr. Prentice informed Mr. Rowley that the report should be treated as confidential attorney work product.

Further, Keitz himself believed that Mr. Prentice, as County Counsel, was serving as his counsel at the time that the investigation was conducted by Mr. Rowley. Keitz was informed by Prentice that Mr. Rowley had been made aware that the Rowley report would be treated as confidential attorney work product.

On May 28, 2010, when the Rowley report was completed, it was addressed to Mr. Prentice in his capacity as County Counsel. The purpose of the Rowley report was to assist Mr. Prentice, in his capacity as County Counsel, in defense of both the County and Keitz. In part on the basis of the legal advice, observations, analysis and opinions contained within the Rowley report, Mr. Prentice was able to determine how best to provide legal counsel to whom he perceived to be his two clients, the County and Keitz. When a lawsuit was subsequently filed by

Ms. Mitchell in the United States District Court for the Eastern District of California, naming the County and Keitz as defendants, the Rowley report assisted Mr. Prentice in defending in the lawsuit both clients, the County and Keitz.

For approximately two years from the date of the Rowley report of May 28, 2010, through late 2012, the Rowley report remained confidential and undisclosed. In fact, in early 2011, it was the subject of discovery dispute in the civil action brought by Ms. Mitchell against the County and Keitz in the United States District Court. On or about February 15, 2011, a motion for a protective order concerning the Rowley report was filed in that action by the firm of Cota Cole LLP, representing both the County and Keitz.

In late 2012, in response to a demand made upon the County under the California Public Records act, the Board of Supervisors, meeting in closed session, directed the current County Counsel, Douglas Nelson, to release the Rowley report to the public.

Keitz contends that the Rowley report constitutes privileged attorney-client work product, and that it is not subject to disclosure. Keitz objects to the release of the report to the public.

II. PROCEDURAL HISTORY

On November 26, 2012, Keitz filed the present Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction. On November 27, 2012, this Court issued a temporary restraining order, temporarily enjoining the disclosure of the Rowley report in the absence of consent by both the County and Keitz. Thereafter, the temporary restraining order was repeatedly extended as the hearing on the petition for preliminary injunction was continued from time to time until the petition for the preliminary injunction finally came to hearing on March 8, 2013. At the hearing on the petition for a preliminary injunction, the parties, through counsel, stipulated that the petition for permanent injunction would be submitted entirely upon

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the record presented for the hearing of the petition for a preliminary injunction[1]. Thereupon, this Court granted the preliminary injunction for the reasons stated on the record, and took under submission the petition for a permanent injunction.

III. DISCUSSION

A. Who Holds the Privilege?

The issue presented in this action is very narrow. Both parties agree that the Rowley report is privileged attorney-client and work product communication. Both parties agree that one of the holders of the privilege is the County. The County contends that it holds the privilege alone. Keitz contends that he holds the privilege together with the County. The resolution depends upon whether an attorney-client relationship existed between the County Counsel and Keitz at the time that the Rowley investigation was conducted and the report was prepared.

In *Chadbourne v. Superior Court (Smith)* (1964) 60 Cal.2d 723, 736-38, in construing the attorney-client privilege in the corporate context, and the circumstances under which the privilege extends to employees of a corporation, the California Supreme Court set forth comprehensive guidelines, which included the following:

> . . . When the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability), his statement regarding the facts with which he or his employer may be charged, obtained by a representative of the employer and delivered to an attorney who represents (or will represent) either or both of them, is entitled to the attorney-client privilege on the same basis as it would be entitled thereto if the employer-employee relationship did not exist; . . .

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[1] As a general rule, "'. . . unless based on stipulation or other satisfactory showings submitting the cause on the merits,' a trial court is 'without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction.'" (*Camp v. Board of Supervisors of Mendocino County* (1981) 123 Cal.App.3d 334, 357) At the hearing on the petition for temporary injunction, this Court cited the above quoted principle from *Camp*, and counsel for both parties specifically stipulated that the petition for permanent injunction would be submitted to the court for decision at the hearing on the record presented for the hearing on the petition for temporary injunction.

It is clear that the attorney-client relationship to be considered in this action is that of the County Counsel with respect to the County and Keitz, and not that of Mr. Rowley with respect to either party. Although Mr. Rowley is an attorney, he was hired by the County, at the direction of the County Counsel, to conduct an investigation for use by the County Counsel in its representation of the County and/or Keitz. Mr. Rowley was not hired to represent either party in litigation. The role of Mr. Rowley was to investigate facts and make a report to the County Counsel, which the County Counsel would then use in his evaluation of the threatened litigation.

The Rowley report is similar to the occurrence reports which were held to be attorney-client communications in *Scripps Health v. Superior Court* (2003) 109 Cal.App.4th 529, in which the parties disagreed as to the nature of confidential occurrence reports prepared by a hospital concerning a wrongful death. Plaintiffs argued the occurrence reports should be disclosed in discovery, and the defendant hospital argued that the reports were protected attorney-client communications. The Court of Appeal ruled that the occurrence reports were privileged attorney-client communications, in part because the "undisputed evidence revealed that [the hospital's] in-house counsel declared that the occurrence reports are confidential records prepared by [hospital] employees under its risk management plan (the Plan) and pursuant to the directive of its legal department." *Id.* at 534-535. Likewise, the Rowley report was previously declared to be confidential by the County, and was commissioned at the direction of the County Counsel.

Similarly, in *Vela v. Superior Court (The People)* (1989) 208 Cal.App.3d 141, a criminal defendant sought to obtain the post-arrest statements of police officers in his prosecution for attempted murder. The statements were made by police officers to members of a "special investigation team" (SIT). The SIT was organized and controlled by the City's Chief of Police for the expressly stated purpose of gathering "information for communication to and use by the City Attorney in defense of civil litigation only." *Id.* at 144-45. The Court, citing *Chadbourne,*

supra, determined that, because the statements were made for the purposes of investigating incidents or occurrences which might lead to the possible institution of a civil action against the City, the statements were privileged.[2] *Id* at 150.

In the present action, as in *Scripps, supra*, in which the attorney-client privilege was predicated upon the investigation being conducted at the direction of the legal department of the hospital, and *Vela, supra*, in which the attorney-client privilege was predicated upon the investigation being conducted for use by the City Attorney, the Rowley report was conducted at the direction of, and for use by, the County Counsel. Therefore, in the present action, it is the relationship of the parties to the County Counsel which determines whether or not the attorney-client relationship existed.

There is no dispute that the attorney-client relationship existed between the County Counsel and the County at the time that the Rowley investigation was conducted and the report was prepared. As noted above, the decisive issue in the present action is whether an attorney-client relationship also existed between the County Counsel and Keitz. "The party claiming privilege carries the burden of showing that the evidence which it seeks to suppress is within the terms of the statute." (*Chadbourne, supra,* 60 Cal.2d. at p. 729.)

Section 951 of the Evidence Code defines "client" as "a person who, directly or through an authorized representative, consults a lawyer for the purpose of . . . securing legal service or advice from him in his professional capacity."

Section 26529(a) of the Government Code provides, is part, as follows:

> . . . The county counsel shall defend or prosecute all civil actions and proceedings in which the county or any of its officers is concerned or is a party in his or her official capacity. Except where the county provides other counsel, the county counsel shall defend . . . any action or proceeding brought against an officer, employee, or servant of the county.

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[2] On an issue not germane to the present action, the Court of Appeal further concluded that the statements may nevertheless need to be revealed pursuant to the criminal defendant's rights under the Confrontation Clause of the Constitution.

The position of Keitz is that there clearly existed an attorney-client relationship between the County Counsel and Keitz. Both Mr. Prentice, the County Counsel at the time, and Keitz believed that such a relationship existed. Keitz, as the object of impending litigation by Ms. Mitchell, received the legal services of the County Counsel through the commissioning of Mr. Rowley to conduct the investigation and prepare the report. Keitz was one of the clients for whom the Rowley report was commissioned, as the report was commissioned to prepare for the impending litigation against Keitz and the County.

Therefore, according to Keitz, the County and Keitz are joint holders of the privilege and are each subject to Evidence Code section 912(b), which provides that "[w]here two or more persons are joint holders of a privilege provided by Section 954 (lawyer-client privilege) . . . a waiver of the right of a particular joint holder of the privilege to claim the privilege does not affect the right of another joint holder to claim the privilege." Irrespective of whether the County now seeks to release the Rowley report, Keitz maintains that he is entitled, as joint holder of the attorney-client and work product privileges, to prevent its disclosure.

The position of the County is that there never existed an attorney-client relationship between Keitz and the County Counsel. Citing *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal. App. 4th 110, the County argues that the Rowley Report was developed for the sole purpose of advising the Board of Supervisors and, therefore, the privilege is held solely by the Board. However, *Wellpoint* merely stands for the proposition that where a defendant employer puts the adequacy of an investigation into alleged employment discrimination/ harassment at issue as a defense, it waives the attorney-client privilege as to that investigation. *See id.* at 128.

Respondent also relies on *Ward v. Superior Court* (1977) 70 Cal. App. 3d 23. In *Ward*, the Los Angeles County Assessor, involved in a lawsuit against the Board of Supervisors, attempted to recuse the County Counsel on the grounds that the County Counsel had a duty of

loyalty to the Assessor and therefore could not engage in representation of the County. *Id.* at 27-30. The Court of Appeal found that the County Counsel did not represent the Assessor, as a matter of law, and that therefore the County Counsel did not need to recuse himself. *Id.* at 34. Further, the Court of Appeal noted that the Assessor could not identify any personal representation or confidential information that the County Counsel could have that would have any bearing on the lawsuit. *Id.* at 35.

Ward, supra, is distinguishable from the present action on many points. First, the Court of Appeal in *Ward* noted that the office of the County Counsel of the County of Los Angeles was established and governed by the Los Angeles County Charter. Therefore, it concluded that ". . . the provisions of the Government Code relating to county counsel would not apply to the situation where the office of county counsel is established by charter in the manner here appearing." *Id.* at 30. Conversely, in the present action, the provisions of the Government Code are applicable to the office of the County Counsel of the County of Madera, including section 26529(a), *supra*.

Further, the Court in *Ward* was specifically addressing the provisions of Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, which provided as follows:

> "A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client." *Ward*, at page 27.

The County Assessor contended that the County Counsel had previously obtained confidential information from the Assessor from the previous representation by the County Counsel of the Assessor in his official capacity, and therefore the County Counsel would need to be recused in any action brought by the Assessor against the County. Borrowing from the corporate context of the representation of corporate shareholders and directors by corporate counsel, and citing *Meehan v. Hopps* (1956) 144 Cal.App.2d 284, the Court of Appeal in *Ward*

concluded that ". . . no attorney-client relationship existed between the county counsel and . . . [the Assessor] *within the meaning of rule 4-101.* [Emphasis added.] (*Ward* at page 34.)

The limitation "within the meaning of rule 4-101" is important to the holding.[3] This Court concludes that it would be far to expansive to extend the holding in *Ward* to mean that an attorney-client relationship can never exist between a County Counsel and an elected department head, such as an Assessor or a District Attorney.

Continuing in *Ward, supra* at page 34, the Court of Appeal noted as follows:

> Our decision that the trial court erred in granting [the Assessor]'s motion to disqualify the county counsel is further supported by the following reasoning. The purpose of rule 4-101 forbidding an attorney from accepting employment adverse to a former client is to protect the former confidential relationship. Thus the rule does not apply where an attorney accepts employment adverse to a former client if the matter bears no relationship to confidential information acquired by the attorney as a result of the former attorney-client relationship. [Citation omitted.]

In *Ward*, the Assessor was seeking to recuse the County Counsel from the representation of the County in a case in which the Assessor was suing the County on a matter unrelated to the Assessor's official duties. In his motion, the Assessor did not establish that the matter upon which he was suing the County had any relationship to any confidential information which was acquired by the County Counsel in the earlier representation of the Assessor by the County Counsel.

Conversely, in the present action, the position of Keitz, as supported by Mr. Prentice, the former County Counsel, is that the information contained in the Rowley report specifically contains confidential information from Keitz provided to Mr. Rowley at the direction of the

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[3] While the substance of the present action has nothing to do with Rule 4.101 [now Rule 3-310(E)] of the Rules of Professional Conduct of the State Bar of California, it is noteworthy that on November 26, 2012, Keitz filed in this action a motion to recuse the County Counsel from representing the County in this action and, in response, on December 5, 2012, the County Counsel recused itself from representing the County. The County has since been represented by independent counsel.

County Counsel, to be conveyed to the County Counsel in anticipation of litigation, at a time during which both Keitz and the County Counsel believed that an attorney-client relationship existed between them, and after Keitz was assured by the County Counsel that confidentiality would be maintained.

The Court finds that Keitz has met his burden of proof in demonstrating that an attorney-client relationship existed between the County Counsel and Keitz such that he holds the attorney-client and work product privileges, together with the County, as to the confidential information contained in the Rowley report.

B. The California Public Records Act

Section 6254(k) of the Government Code provides an exemption to the disclosure requirements of the California Public Records Act (hereinafter "CPRA"), exempting from disclosure "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." As the Attorney General concluded in 1988 concerning the relationship between section 6254(k) and the CPRA, ". . . it would seem undeniable that the lawyer-client privilege and work-product rule could be relied upon by a public officer to their full extent without concern for the disclosure requirement of the [CPRA]. Well-established principles of statutory construction support such a conclusion. . . . To the extent, then, that a public officer were otherwise able to rely upon the privilege or rule, including extension beyond adjudication or settlement of any underlying claim, the [CPRA] appears to allow the assertion of such right." 71 *Ops.Cal.Atty.Gen.* 5, 7 (Cal. AG 1988).

As set forth above, both the attorney-client privilege and the attorney work product privilege, each of which have been lawfully claimed by Keitz in this matter with respect to the Rowley report, operate to prevent the disclosure of the Rowley report. Section 6254(k) exempts the Rowley report, in the presence of these privileges, from disclosure under the CPRA. As

stated by the Supreme Court, the CPRA "exempts certain public records from disclosure . . . including '[r]ecords the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.' (§ 6254, Subd. (k).) By its reference to the privileges contained in the Evidence Code, therefore, the Public Records Act has made the attorney-client privilege applicable to public records." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370)

In *Roberts*, a resident and taxpayer of the City of Palmdale appealed to the City Council concerning a parcel map approved by the City planning commission. The City Attorney prepared a confidential letter to the Council concerning the appeal. The Council approved the map, and the resident demanded a copy of the letter under the CPRA. The Council refused to provide the letter, claiming that Section 6254(k) exempted disclosure of the attorney-client privileged letter. The Supreme Court upheld the Council's decision to withhold the letter as attorney-client privileged communication, and thus not subject to disclosure under the CPRA. The Supreme Court emphasized the imperative nature of upholding this exemption to otherwise lawful public records disclosure, stating that "our deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege, because the Legislature has determined that evidentiary privileges shall be available only as defined by statute." (*Roberts, supra,* 5 Cal.4th at p. 373.)

In the present action, Keitz has asserted both the attorney-client and work product privileges with respect to the contents of the Rowley report. Therefore, the Rowley report is exempt from disclosure under the CPRA pursuant to section 6254(k) of the Government Code.

IV. CONCLUSION

For the reasons state above, this Court finds as follows:

1. The Rowley report constitutes privileged and confidential attorney-client communication and work product;

2. Both the County and Keitz are holders of such privileges;

3. Keitz has asserted the attorney-client and work product privileges with respect to the contents of the Rowley report; and therefore,

4. The Rowley report is exempt from disclosure under the CPRA pursuant to section 6254(k) of the Government Code.

V. PERMANENT INJUNCTION

IT IS HEREBY ORDERED that the report prepared in 2010 and known commonly as the Rowley report, and as referenced in the Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, filed by the petitioner herein on November 26, 2012, is declared to be privileged and confidential attorney-client communication and work product; that a holder of this privilege is petitioner Michael R. Keitz; and the respondent County of Madera is hereby enjoined from releasing, and may not release, disclose or discuss any aspect of the Rowley report with any member of the public unless and until respondent County of Madera has the consent of the petitioner Michael R. Keitz.

Counsel for the petitioner shall prepare and submit to the Court an appropriate form of Judgment.

Dated: May 13, 2013

JUDGE OF THE SUPERIOR COURT

FILED
MADERA SUPERIOR COURT

MAY 13 2013

BONNIE THOMAS
CLERK

DEPUTY

MCV062112

Certificate of Mailing

I, the undersigned, hereby certify that I am employed in the County of Madera, State of California, over the age of eighteen years and not a party to the within action. On the date set forth below I served on the Parties whose names appear herein below, addressed as therein shown by depositing true copies of: FINDINGS AND ORDER AFTER HEARING ON PETITION FOR PERMANENT INJUNCTION; HEARING DATE OF: 03-08-2013; enclosed in a sealed envelope with postage, in the Superior Court mail basket for deposit in the United States Post Office at Madera, California, addressed as follows:

Martin J. Mayer
3777 N Harbor Blvd.
Fullerton, CA 92835

Matthew Fletcher
5 River Park Place East
Fresno, CA 93720

I declare under penalty of perjury that the foregoing is true and correct, and that the proof of service was executed in Madera, California on May 13, 2013.

FILIGATA SAMUELU